

## EXHIBIT P (Part Two)

1 MR. LUKAS: Our request for production was Number  
2 Twenty-Five, not Thirty-Five.

3 MS. SREY: There's Nineteen, Twenty, and Twenty-Five  
4 that relate to the classification.

5 MR. LUKAS: We cite them in our brief, Requests  
6 Nineteen, Twenty, and Twenty-Five, and they assert the  
7 privilege when it comes to good faith efforts and  
8 classification efforts, and they don't give us a single  
9 document, and they still haven't today. That was back in  
10 2004.

11 It's Exhibit Two -- Two to our brief?

12 MS. SREY: One.

13 MR. LUKAS: Exhibit One to our brief.

14 No. Exhibit One is the interrogatory, isn't it?

15 MS. SREY: Oh. Two, yes.

16 MR. LUKAS: Exhibit One is the interrogatory where  
17 they flat out say they --

18 THE COURT: So on -- on page two of your brief you  
19 set them out, right?

20 MR. LUKAS: Okay. Exhibit One, pages five and six,  
21 it's Interrogatory Number Six. It's our request and their  
22 answer.

23 (Pause in proceedings)

24 MR. LUKAS: And then in Exhibit Two, Requests Number  
25 Twenty and Twenty-Five, they again assert the privilege on --

1 on the Fair Labor Standards Act compliance issues and willful  
2 and liquidated. Twenty-Five specifically asked willful and  
3 liquidated, and they assert the privilege.

4 THE COURT: Which request was that?

5 MR. LUKAS: It's Exhibit Number Two --

6 THE COURT: Yes.

7 MR. LUKAS: -- Request Twenty-Five, page ten.

8 THE COURT: Twenty-five? Thank you.

9 (Pause in proceedings)

10 THE COURT: Was there a -- a motion to compel with  
11 respect to this earlier?

12 MR. LUKAS: No, your Honor.

13 MR. VARNELL: No, your Honor, there was not.

14 MR. LUKAS: We didn't challenge their assertion of  
15 the privilege.

16 THE COURT: Well, but they -- they -- they are  
17 asserting more than the -- the attorney-client privilege  
18 they're asserting, but they're also asserting that there's a  
19 burden on you, that they don't have to produce the documents.

20 MR. LUKAS: Well, "willful" is a burden on us;  
21 "liquidated" is not. "Liquidated" is their burden.

22 But, no, we didn't bring a motion to compel on that  
23 because they asserted the privilege, so --

24 MR. VARNELL: Your Honor, I would say we -- we  
25 asserted the privilege at the -- the -- the beginning of the

1 litigation, and we -- we continue to assert the privilege.

2 THE COURT: Was there a search done for any other  
3 document other than attorney-client privileged documents that  
4 dealt --

5 MR. VARNELL: Yes, your Honor. We -- we looked --  
6 we looked in David Carroll's files to see what else he had.

7 THE COURT: And were those turned over?

8 MR. VARNELL: There -- the -- the documents that he  
9 has are the -- the -- the ones that we produced --

10 THE COURT: In response to Thirty-Five?

11 MR. VARNELL: -- in response to -- to Thirty-Five.

12 He doesn't have any other documents related to the  
13 other document requests that we've been discussing.

14 THE COURT: So everything else was informal  
15 information he gathered and/or discussions he may have had  
16 with counsel.

17 MR. VARNELL: That's correct, your Honor.

18 THE COURT: And there's never been a search for any  
19 of the written correspondence he may or may not have had with  
20 Chyette, though from his deposition you indicate that his  
21 communications with Chyette were oral.

22 MR. VARNELL: We -- we did go back to -- to look at  
23 his files to see if there was anything else in there that was  
24 not privileged or what -- what he had --

25 THE COURT: Were there any documents in there that

1 were privileged that would be put on a privilege log?

2 MR. VARNELL: I'm not aware of any, your Honor, no.  
3 We did -- we did that search, and we didn't find any documents  
4 between Mr. Carroll and Mr. Chyette on the decision-making  
5 process.

6 He said at his deposition that those were informal  
7 discussions that he had with -- with Mr. Chyette, that there  
8 wasn't paper generated on them.

9 THE COURT: You've not checked Chyette's hard copy  
10 files with respect to any communications he may have had with  
11 Carroll. You checked Carroll's files, right?

12 MR. VARNELL: We checked David Carroll's files, your  
13 Honor.

14 THE COURT: Did you check Chyette's?

15 MR. VARNELL: Your Honor, I would have to check and  
16 see. Our discovery production was, you know, a long time ago.

17 THE COURT: I mean, if there are none that would be  
18 on a privilege log --

19 MR. LUKAS: You read that declaration. You tell me  
20 there's no documents relating to that road map that he laid  
21 out, nothing with the NBA or the DOL? I find -- I'd like that  
22 in writing because I think a jury is going to find it  
23 impossible to believe that he did all of those things and  
24 didn't generate a single piece of paper. It's -- that will  
25 work just fine, too, I suppose.

1 MR. VARNELL: Your Honor, David Carroll and  
2 Richard Chyette go back many years. They've had a long  
3 working relationship, I think, since the -- either the late  
4 eighties or the -- the early nineties. He made clear at his  
5 deposition that they were informal conversations that they  
6 had.

7 It's a relatively informal company in some ways.  
8 David Carroll's title I think officially is "Vice President  
9 for Administration," but he also carries another title about  
10 vice president for -- for miscellaneous stuff.

11 THE COURT: And -- and -- and Carroll's fully  
12 competent to do the legal analysis on his own, as he  
13 apparently did in the declaration.

14 MR. VARNELL: Your Honor, he -- he looked at various  
15 relevant legal materials, but he was not -- he was very open  
16 about the fact that he -- he consulted and conferred with his  
17 -- with his counsel on that: Mr. Chyette. He doesn't hold  
18 himself out as a -- as an expert on the law or how to classify  
19 people under the FLSA. It's -- it's very complicated, and so  
20 he did turn to his attorneys for advice on that, but he -- but  
21 he made -- he made clear that he was arriving at the -- the --  
22 the decision in a thoughtful, measured way.

23 THE COURT: I'm assuming the DOL opinion letter was  
24 solicited by the Mortgage Bankers Association in tandem with  
25 its members, of which your client is one, I assume.

1 MR. VARNELL: Yes. Your -- your Honor, actually I  
2 -- I can speak to that. I believe that we produced to the  
3 Court the request letter from the Mortgage Bankers Association  
4 to --

5 THE COURT: As well as the response to it.

6 MR. VARNELL: -- to the Department of Labor, which  
7 was signed by -- by Mr. Bordenaur [ph. spelling], the senior  
8 officer of the Mortgage Bankers Association.

9 THE COURT: And I understand your defense in this  
10 case is that your employees were on the safe side of -- in  
11 their job functions, were on the safe side of that opinion  
12 letter.

13 MR. VARNELL: Absolutely.

14 MR. LUKAS: In fact, your Honor, Mr. Davis  
15 represented the Mortgage Bankers Association in connection  
16 with that letter.

17 If they say there's no documents, we know there's  
18 e-mails, and they haven't given us those. You didn't ask him  
19 if he looked for those.

20 There's -- there's no way there's no communication  
21 whatsoever or any documents, no e-mails relating to any of  
22 this road map. There's no way. There is at least e-mails,  
23 tons of e-mails, and we haven't gotten over ninety-five  
24 percent of what we were supposed to get.

25 MR. VARNELL: Your Honor, we've -- we've produced

1 the -- the e-mail communications between David Carroll and the  
2 Mortgage Bankers Association. That's part of what we produced  
3 in response to Request Number Thirty-Five.

4 MR. LUKAS: We haven't gotten one e-mail relating to  
5 his classification decision or the classification decision  
6 with Mr. Chyette or anyone else.

7 THE COURT: But -- but the -- but at the time, he  
8 was screened out for making e-mails. You knew that. He was  
9 -- he was on the attorney list.

10 MR. LUKAS: Your Honor, we didn't --

11 THE COURT: He wasn't one --

12 MR. LUKAS: -- get this declaration until two days  
13 after we got the invoice for the e-mail screening.

14 THE COURT: I have not read his whole deposition,  
15 but at his deposition did you not go into the -- the very  
16 same --

17 MR. LUKAS: I did not go --

18 THE COURT: -- decision?

19 MR. LUKAS: -- into the privileged conversations. I  
20 absolutely did not.

21 THE COURT: No, but did you go into what his  
22 decision was, because he says he was the decision-maker? You  
23 could ask him what were his decisions, what were the factors  
24 that were put into his decisions.

25 MR. LUKAS: I asked him about a lot of those things,



1 and I didn't touch his conversations with counsel, and he kept  
2 saying repeatedly it was he and Mr. Chyette, he and  
3 Mr. Chyette. I got half the story, and I've still got half  
4 the story except now they get to tell the whole story but I  
5 don't get to look behind the curtain. That's what they're  
6 saying. "I get to tell the whole story about what good faith  
7 I showed and I talked to my lawyers," but I don't get to look  
8 behind the curtain.

9 I not only don't get privileged stuff. They're  
10 saying -- now I hear him saying for the first time there isn't  
11 any non-privileged stuff. Now, they left out e-mails. We  
12 didn't get the e-mails, that's for certain, so we should at  
13 least get the e-mails.

14 I can accept that there's no non-privileged  
15 documents. I actually kind of like that. I like talking to  
16 the jury about how he claims he did all these things at the  
17 time, not recreating it later -- he did at the time and  
18 generated not a single document. That's fine; but the  
19 e-mails, we get.

20 MR. VARNELL: Your Honor, to the -- to the extent  
21 that his declaration acknowledges the fact that he -- that he  
22 talked to -- to legal counsel, he -- he did the same thing at  
23 -- at his deposition. I mean, there's -- there's no surprise  
24 there. The -- the fact that he submitted his declaration  
25 doesn't -- doesn't change the equation. That's nothing new to

1 -- to Mr. Lukas and his team.

2 MR. LUKAS: The Department of Labor letter came out  
3 after the deposition. A lot of things happened after the  
4 deposition.

5 THE COURT: It was issued after the --

6 MR. LUKAS: He said -- he went on and on that this  
7 was an ongoing process. You read the declaration.

8 THE COURT: But -- but the declaration seems to -- I  
9 read the declaration as he took this position and he never  
10 altered it and that it was -- it was, if anything, ratified  
11 and -- and -- and his earlier decision-making process was  
12 basically agreed upon by the Department of Labor opinion  
13 letter because obviously they were working to get a letter  
14 that would give them a safe harbor, but I -- I don't see any  
15 suggestion that he ever changed his opinion from the 2006,  
16 2005 decision he made with Chyette.

17 MR. LUKAS: And we never got to -- we never got to  
18 explore that decision he made with Chyette. We only got to  
19 explore what he was telling us at the deposition, and that's  
20 it, and they haven't produced a single document or an e-mail  
21 result revolving around that conversation.

22 Now, I think we're just talking about e-mails --

23 THE COURT: What -- I mean --

24 MR. LUKAS: -- because Mr. Varnell said there's no  
25 documents, so all we're talking about is e-mails. We should

1 get his e-mails relating to this classification decision.

2 MR. VARNELL: Again, your Honor, I -- I would just  
3 respectfully submit we asserted the privilege at the beginning  
4 of this litigation; we asserted it in -- at his deposition; we  
5 continued to assert it through the issuance of his  
6 declaration; we continue to assert it now.

7 THE COURT: At the deposition, were there inquiries  
8 into -- into Carroll's decision-making process, since he said  
9 he was the decision-maker -- the ultimate decision-maker for  
10 the --

11 MR. LUKAS: Yes, I asked him what he reviewed. I  
12 did.

13 THE COURT: Okay. And did he give you answers? I  
14 take it that --

15 MR. LUKAS: He gave me answers about what he did,  
16 but I didn't ask him about his -- and he -- and -- and he --  
17 he laid out Chyette -- his conversations with Chyette and how  
18 he kept talking to Chyette, and I didn't go into that.

19 THE COURT: Okay. You -- you carved out Chyette,  
20 but with respect to -- he did a lot other than Chyette. Did  
21 you go into what he did with Human Resources -- H.R.?

22 MR. LUKAS: He didn't identify Human Resources at  
23 the time. He said he and Mr. Chyette. He looked at -- here's  
24 what he told me at the depo'. He looked -- I think if you  
25 compare the depo' to his declaration, his declaration is far

1 more -- more thorough. He said he looked at Conseco and he  
2 looked at the -- what was it? --

3 MS. SREY: John Alden.

4 MR. LUKAS: -- and John Alden case and decided it  
5 should be not mixed in, and he talked to Chyette. He left the  
6 impression that the -- the majority of the heavy lifting was  
7 Chyette, and when you read the depo', I think you come to the  
8 same conclusion, and we left it alone because they had  
9 asserted the privilege.

10 I hear them saying the issue is whether they waive  
11 privilege or not because they're claiming they still have  
12 privilege.

13 THE COURT: They are claiming --

14 MR. LUKAS: Yeah.

15 THE COURT: -- that they still privilege.

16 MR. LUKAS: Well, I think it's clear that they  
17 don't, and we should get the e-mails because I understand  
18 there's no documents anywhere. We get the e-mails.

19 THE COURT: Anyway, I'm going to have to review the  
20 cases. I will read the entire --

21 MR. LUKAS: Certainly, your Honor.

22 THE COURT: -- deposition at the same time --

23 MR. LUKAS: I hear you.

24 THE COURT: -- I re-read the declaration that he's  
25 filed.

1 I am troubled by the attorneys wearing multiple hats  
2 to sort of have their cake and eat it, too, but it may very  
3 well be that the law of privilege allows that.

4 MR. LUKAS: I don't think it does.

5 THE COURT: Anyway, that's going to have to wait  
6 under advisement pending my further review.

7 THE CLERK: The other motion --

8 THE COURT: Yeah. I think we should take a ten-  
9 minute break.

10 MR. LUKAS: Okay, Judge.

11 MR. DAVIS: Thank you, your Honor. Your Honor,  
12 personally I appreciate that very much.

13 THE COURT: Well, I'm glad. You could have left.  
14 You were not arguing. I wouldn't have been offended. I would  
15 have understood.

16 (Recess in proceedings)

17 THE COURT: Okay. Recalling the Henry case.

18 And, Mr. Lukas, let me ask you to give me a tutorial  
19 on the screening process, and I will need an explanation of  
20 the difference between a reply with history when there's a  
21 whole string of cases and this nested concept that's part of  
22 your explanation of what the agreement was.

23 MR. LUKAS: You want me to throw in a little of that  
24 -- what was that other one? You want me to throw in a  
25 little --

1 MS. SREY: Hypogeometric.

2 MR. LUKAS: -- hypo -- what was it? -- hypogeometric  
3 something?

4 MR. VARNELL: Hypergeometric.

5 MR. LUKAS: Yeah.

6 THE COURT: No. We're going go in every e-mail.  
7 We're not going to take a random sampling of them.

8 MR. LUKAS: Yeah. I guess they just scared me away  
9 from it.

10 THE COURT: I hope your -- I hope your flights were  
11 at six or so.

12 MR. VARNELL: Yes.

13 MR. DAVIS: We're -- we're fine, your Honor.

14 THE COURT: Okay. Okay.

15 MR. LUKAS: Are you ready for us, Judge?

16 THE COURT: I'm ready for you.

17 MR. LUKAS: Okay. On this motion for release [sic]  
18 -- relief, I think it -- we've already talked about the  
19 context of that screening, and it was our understanding that  
20 they had asserted a privilege. That was one of the reasons we  
21 were willing to give what you, I think, called a generous kind  
22 of -- you know, we agreed to stuff we otherwise wouldn't, but  
23 without respect to that, and we've been through that, there  
24 was a very broad screening procedure that was put in place,  
25 and that broad screening procedure included basically five

1 steps.

2 We first listed the plaintiffs -- only the  
3 plaintiffs who were in the case with their e-mail -- only the  
4 -- first of all, we picked the dates, and for those three  
5 months, only the plaintiffs' and their managers' who worked  
6 during those months e-mail boxes would be searched.

7 The second thing we limited was we limited to key  
8 terms or what we call Plaintiffs' terms, so we were only  
9 searching for Plaintiffs' terms.

10 The third thing we did was we included some  
11 exclusionary terms from Defendant: legal, compliance,  
12 privilege, confidential, counsel, lawyer, attorney. Those --  
13 those were the exclusionary terms.

14 Then we decided we were also excluding lawyer names,  
15 lawyers from the legal department. We've looked at that and  
16 talked about that a little bit already.

17 And then the last thing we did is we --

18 THE COURT: And originally that was with first and  
19 last names.

20 MR. LUKAS: It was first and last names. The -- the  
21 terms were listed "David Carroll," one line;  
22 "Richard Chyette," one line; not "David," "Carroll,"  
23 "Richard," "Chyette," like you would see if they were going to  
24 be one on one.

25 And the last thing we did is we made Mr. Lanterman

1 their agent, someone we could not and were prohibited and  
2 forbidden from talking to, so those are the things we did.

3 Defendant argues in their brief that you somehow  
4 said that they were allowed every -- every feasible means, but  
5 if you read what you said in context, you were addressing  
6 Mr. Davis' concern about a Southern District of Missouri judge  
7 saying you waive something, and you were saying, well, with  
8 this process -- and this process being the one I just  
9 described for you -- you can say to the court in the Southern  
10 District of Missouri that, quote:

11 "We took every feasible means to screen out  
12 attorney-client privilege before turning over to the  
13 plaintiff."

14 That was the context of "every feasible means," not  
15 that they could expand this already ridiculously expansive  
16 screening, so I wanted to point that out because that's a  
17 pretty --

18 THE COURT: I was -- I was providing Mr. Davis the  
19 more hyperbolic defense statements they could make in another  
20 court.

21 MR. LUKAS: You were -- that -- that was supposed to  
22 be quoted -- that was supposed to be quoted in a different  
23 courtroom --

24 THE COURT: Okay.

25 MR. LUKAS: -- not right back here in the way he did



1 it.

2 THE COURT: So they took that as a license --

3 MR. LUKAS: Right, and --

4 THE COURT: -- to make it a true statement.

5 MR. LUKAS: Right.

6 The reason I point that out is because they  
7 basically make it sound like they had carte blanche to do  
8 whatever they wanted. We already gave them the moon when it  
9 came to this screening.

10 So that's where we were. So we --

11 THE COURT: Now --

12 MR. LUKAS: -- couldn't talk to Lanterman, and we  
13 were doing all these things.

14 THE COURT: In that hearing, since I didn't think  
15 about it until reading this motion, was there an agreement in  
16 working out a protocol with regard at least to when there's a  
17 reply with history that when it talked only about the top or  
18 if there's a bottom history that has an attorney name, that  
19 they all get flushed?

20 MR. LUKAS: Yeah. I don't think we talked about it.  
21 Like the -- the -- I think they called them nested and  
22 embedded e-mails, I don't think we talked about that, and I'm  
23 not sure that that's that big of an issue with respect -- for  
24 us it's not that big of an issue as to whether they should  
25 have or shouldn't have been.

1 To us the issue with the nested and the embedded --  
2 and I'll get to that -- is that they went back, redid it to do  
3 that without talking to anybody about it. That -- that's  
4 really more of our complaint. Whether it should have been  
5 done in the first place or not is -- is -- I wouldn't say  
6 irrelevant, but it's not as important to us as why did you  
7 just go do it and ring up another twelve grand and not say  
8 anything to anybody about it.

9 But that's what happened, so here's what happened.  
10 So that's what it was supposed to be; here's what happened,  
11 and frankly, the only reason we know what happened is because  
12 Mr. Lanterman provided a pretty detailed invoice. Had  
13 Mr. Lanterman sent us a letter saying, "You owe us ninety-one  
14 grand," we'd have no clue that any of this stuff happened that  
15 I'm about to tell you --

16 THE COURT: Okay.

17 MR. LUKAS: -- but here's what happened.

18 THE COURT: But -- but there was no agreement or  
19 understanding with regard to whether the screening would be of  
20 the -- I'm now just using "reply with history" because that's  
21 what I'm familiar with, though I also know sometimes I get  
22 a --

23 MR. LUKAS: Yeah.

24 THE COURT: -- pdf attachment that I have to double-  
25 click on to open, but -- but there was no --

1 MR. LUKAS: I don't think it was addressed, Judge,  
2 and -- and these guys can say if they remember it, but I don't  
3 remember us talking about this nested, embedded, string -- I  
4 call them string e-mails.

5 THE COURT: Strings. Okay. Well, anyway. "Reply  
6 with history" is --

7 MR. LUKAS: I -- I don't remember us talking about  
8 that. I really don't, so --

9 MS. SREY: I think we talked about a "To," "From,"  
10 and then a "cc" situation, but I don't --

11 MR. LUKAS: Yeah.

12 MR. VARNELL: Your Honor, I -- I wasn't at the  
13 hearing, but I've read the transcript pretty closely, and the  
14 -- the nested e-mails and the attachments I -- I don't believe  
15 were addressed --

16 THE COURT: No, but I --

17 MR. VARNELL: -- addressed specifically.

18 THE COURT: -- I -- I was assuming there were going  
19 to be a meet-and-confer to work out protocols much beyond what  
20 I -- limited thought that I had given to it at the hearing. I  
21 mean, I -- I --

22 MR. LUKAS: Well, there was.

23 THE COURT: -- I wasn't assuming at that hearing  
24 that I had written in granite the entire marching orders to  
25 that because I -- one, I'm not competent to do it, and

1 secondly, that was not my intent.

2 MR. LUKAS: Well, your Honor, I think --

3 THE COURT: It would be resolved, sort of a meta  
4 issue with regard to attorney-client privilege, but okay.  
5 Anyway --

6 MR. LUKAS: So -- so he --

7 THE COURT: -- there was -- there was no  
8 consideration of that.

9 MR. LUKAS: I don't believe so, Judge.

10 THE COURT: Okay.

11 MR. LUKAS: Okay?

12 THE COURT: That may or may not have caused extra  
13 problems, but go ahead.

14 MR. LUKAS: Right.

15 Here's what did happen, and here's what we -- here's  
16 what we've pieced together.

17 They -- Mr. Lanterman did do the retrieval and the  
18 conversion. That was fifteen thousand bucks, and as I told  
19 you earlier, we paid that right away.

20 THE COURT: Yeah.

21 MR. LUKAS: Then he screened the manager -- the  
22 manger e-mail boxes. That cost twenty-seven thousand dollars.  
23 Okay?

24 Then they went back to Defendant, and apparently  
25 Defendant went back to Mr. Lanterman and said, "Well, you need

1 to expand the lawyer list, not just David Carroll; has to be  
2 'David,' 'Carroll,' separate inquiries."

3 THE COURT: And this was for all of the attorneys?

4 MR. LUKAS: All of the managers' boxes.

5 So Mr. Lanterman ran them again and excluded first  
6 names and last names as separate exclusionary terms. This  
7 cost another twelve thousand bucks.

8 Then it went back to Defendant, and then Defendant  
9 found this embedded/nested issue, sent that back.

10 THE COURT: Okay. Explain that to me now.

11 MR. LUKAS: The embedded/nested is what we were  
12 talking about. Basically, it's a -- two things, as I  
13 understand it, and I can be corrected, but it's an attachment  
14 to an e-mail. Whatever is attached wasn't searched the first  
15 time by Mr. Lanterman, and they wanted whatever is attached.

16 I think -- I'm not sure which is which, and I think  
17 the other is sort of the string -- is it the string or is  
18 it --

19 MR. VARNELL: A nested e-mail, your Honor, is that  
20 function on Outlook where you can forward an e-mail to  
21 somebody else, and when it appears on the -- the recipient's  
22 computer screen or monitor, it looks actually like a -- an  
23 envelope that you then have to click on to open up. That --  
24 that's what a nested e-mail is.

25 MR. LUKAS: It's like forwarding an e-mail. It's

1 forwarding an actual -- it's like dragging and dropping  
2 e-mail onto another e-mail and mailing that -- e-mailing that.

3 Right?

4 MR. VARNELL: That's correct. It's different from  
5 just forwarding an e-mail on, but it's -- it's --

6 THE COURT: I've never used Outlook. I only use  
7 Lotus, but --

8 MR. VARNELL: It's the other --

9 THE COURT: -- but it's -- it's if you were  
10 forwarding an e-mail --

11 MR. VARNELL: It's -- it's essentially forwarding an  
12 -- an e-mail in its physical form so that it -- on Outlook, it  
13 shows up like that.

14 THE COURT: It just arrives in their in-box as  
15 another item that needs to be opened, much like an attachment  
16 would in Lotus.

17 MR. LUKAS: Exactly.

18 MR. VARNELL: That's -- that's correct, your Honor.

19 THE COURT: Okay.

20 MR. LUKAS: So -- so they -- they -- they -- they --  
21 they screened the managers' boxes; then they redid it and  
22 expanded the first and last names. No call to us. No letter  
23 to us. No indication to us that there was a problem.

24 Then they went back -- sent it back to Mr. Lanterman  
25 again, this time removing embedded and nested e-mails. Again,

1 no phone call to us, no letter to us, no indication to us that  
2 they're sending it back. That cost another fifteen thousand  
3 eight hundred bucks, the removing the embedded and the nested.

4 Then they turned their attention to the plaintiffs'  
5 e-mail boxes, and using the same first and last name,  
6 embedded/nested, and everything else we agreed to, then they  
7 screened the plaintiffs' e-mail boxes. That's twelve thousand  
8 five hundred bucks.

9 Then --

10 THE COURT: But that would be a first run, so if  
11 they did it right --

12 MR. LUKAS: First run, right.

13 THE COURT: -- that's the first run. This is not a  
14 rerun.

15 MR. LUKAS: That's a first run.

16 So we've got the fifteen grand we've already paid;  
17 we've got the twenty-seven hundred [sic] for the first run of  
18 the manager -- or twenty-seven thousand for the first run of  
19 the managers' e-mail boxes; and now you've got the twelve  
20 thousand five hundred for the first run of the plaintiffs.  
21 Those are the three what we would call legitimate expenditures  
22 based on the protocol, not -- without respect to the privilege  
23 issue, but they expanded the first and last names. That was  
24 another twelve-thousand-dollar run. The removing embedded and  
25 nested was another sixteen-thousand-dollar run. These are

1 round numbers.

2 And then here's the last thing they did. So they  
3 screened the plaintiffs' e-mail boxes, and they realized that  
4 by separating out these first and last names of the managers  
5 -- of the legal department, they basically wiped out some  
6 plaintiffs' e-mail boxes entirely, because some of the  
7 plaintiffs' was "David" somebody or "Amy" somebody who had a  
8 first name the same as --

9 THE COURT: A lawyer.

10 MR. LUKAS: -- a lawyer.

11 So then they went back, and I'm still not sure how  
12 they did this. They repopulated four of the plaintiffs'  
13 e-mail boxes. It generated about -- they -- they took out  
14 those four -- they took out four first-name exclusionary  
15 terms, repopulated the e-mail boxes, and got us -- I think it  
16 resulted in another ten thousand or so e-mails, and that cost  
17 another twelve thousand bucks.

18 So those are the things that happened, and when you  
19 look at the plaintiffs' -- you look at what was actually  
20 produced, there's some kind of bizarre things that happened.  
21 Like, John -- well, we think through that process, including  
22 this first-and-last-name thing, we believe that they excluded  
23 over ninety-five percent of the e-mails, and -- and the reason  
24 -- you know, and they did -- a lot of this they did without  
25 ever talking to us.



1 Oh, by the way -- and I think we have it in our  
2 reply brief -- during some of these times, for example, like  
3 the first and last name, the very day they decided to rerun it  
4 and -- and separate out these first and last names, Ms. Srey  
5 had sent Mr. Varnell an e-mail saying, "How are things going  
6 on the e-mail search?" Not a word. Not a word about, "Oh,  
7 we're about to do a second run because Mr. Lanterman screwed  
8 up," or anything like that. It was an attempt to expand the  
9 search beyond the protocol without talking to us.

10 But there's some -- we believe ninety-five percent  
11 or more, probably more, of the e-mails were excluded. We  
12 asked Mr. Lanterman in his depo' how many of the e-mails were  
13 actually produced and how many were actually screened. He  
14 said, "Oh, I can figure that out for you. I've got the run  
15 upstairs."

16 We said, "Well, just put it in a letter to us,  
17 okay?"

18 "Sure."

19 No letter. No letter. We go back and forth with  
20 Mr. Varnell. I don't know if Mr. Varnell told Mr. Lanterman  
21 not to send us the letter or what. We never got it. We still  
22 don't have it.

23 We believe it's ninety-five percent or more that are  
24 excluded, and the reason we believe that is when you look at  
25 some of these e-mail boxes -- John Baldezar [ph. spelling] --

1 Balkdezar [ph. spelling] -- he's one of our plaintiffs; he  
2 doesn't have one of those "David" or "Amy's" or legal law --  
3 or one of the legal members' first name problems -- he has two  
4 e-mails produced in his e-mail box for a three-month period.  
5 -- Two e-mails, and there's a lot of circumstances like that  
6 where there -- where there's almost nothing in them.

7           Those ten thousand -- here's another sort of  
8 interesting thing that happened with the run. Those ten  
9 thousand kind of repopulated e-mails that we got from  
10 Defendant as a result of them repopulating those four  
11 mailboxes, Defendant did a hand search for privilege. Do you  
12 know how many privileged documents they found in those ten  
13 thousand? Zero. They held back none. After doing a hand  
14 search of privileged documents: none.

15           So we wouldn't have known about any of this but for  
16 the detailed invoice, because we get the invoice and it says  
17 "Submittal One," "Submittal Two," and it's fifteen thousand  
18 dollars here and twenty thousand dollars there, and not one  
19 phone call, not one inquiry, no disclosure. We're  
20 communicating with them right at the same time. They refuse  
21 to let us talk to him, you know, and they end up screening out  
22 almost all of the e-mails as a result of this process.

23           What we're asking for in this motion -- and this  
24 motion isn't related to the privilege -- first of all, we  
25 think this whole screening process, as we argued in the first

1 motion, was unnecessary in the first place, but in this  
2 motion, we're asking that they pay for these three reruns:  
3 the rerun with the first and last name, we're asking that they  
4 pay for the rerun on the removal of the embedded and nested,  
5 and we're asking for the repopulation of the four plaintiffs'  
6 e-mail boxes.

7 THE COURT: It wasn't a removal of the embedded and  
8 nested but search the embedded and nested for the terms --

9 MR. LUKAS: Right.

10 THE COURT: -- and -- and the excluded names for  
11 lawyers.

12 MR. LUKAS: And the exclusion which pretty much  
13 wiped them out, we think, all but less than five percent  
14 probably, and that's what we're asking for in this motion.

15 It's -- you know, without respect -- we believe they  
16 ran the search, they didn't like the result, they wanted it  
17 broader, they went back. Then they -- they went, "Oops, we  
18 went too far." They repopulated, all of this happening  
19 without talking to us, without talking to the Court, without  
20 doing anything.

21 Interestingly enough, Mr. Lanterman ran the search  
22 with the first and last name of the legal people as one  
23 exclusionary term like we expected. He's the expert. He runs  
24 these searches all the time. They're the ones that go back  
25 and go, "Oh, it was always meant to be first and last," and it

1 was never meant to be first and last, and -- and that's what  
2 we're saying, is that this -- they should have to pay for  
3 those things.

4 It's a situation where even if it's not sinister --  
5 let's say, you know, that it's something -- it's --  
6 Mr. Lanterman just made these mistakes and they had to correct  
7 them. Well, he made these mistakes under their watch. He was  
8 their agent. We weren't allowed to talk to Mr. Lanterman, so  
9 at the very least, this is their fault, their mistake. They  
10 ran a fifty-thousand-dollar e-mail search up to ninety-one  
11 grand. That's what happened, and that's on the best day when  
12 you don't consider privilege and how we went through all of  
13 this rigmarole to protect something that was going to be  
14 waived two days later.

15 That's our position on this motion, your Honor.

16 THE COURT: Thank you.

17 Mr. Varnell?

18 MR. VARNELL: Your Honor, I think I'd like to start  
19 out with a couple of intro' comments, and then to the extent  
20 you want to ask me about the -- the first and last name issue,  
21 the nested e-mails, the attachments, that kind of thing, I'm  
22 happy to do that.

23 Just briefly, Plaintiffs' motions, they -- they  
24 contain a lot of rhetoric, essentially accusing me and my  
25 colleagues of this dark conspiracy. Mr. Lukas just said "even

1 if it wasn't sinister," implying that maybe there was some  
2 sinister motive to deprive them of e-mails and -- and drive up  
3 the cost. I pulled out of their brief phrases like we took  
4 advantage, there was abuse, we were over-zealous, there was a  
5 scheme, there -- there was hiding, that we gleefully ran up  
6 costs, all of that kind of stuff. There's no basis for these  
7 accusations, and -- and again, just a couple of intro' points.

8 The Court came up with a -- a -- a workable solution  
9 that was to balance their demands for e-mails, which they got,  
10 as well as protecting Defendant's privileged information,  
11 which we made clear was -- was important to us.

12 Last year, starting in the summer and then going way  
13 over into the fall, my colleagues and I worked hard to put  
14 that -- that solution together, and I should say, your Honor,  
15 we spent a lot of hours doing that, not at their expense but  
16 at our expense: things like this July 10th letter that --  
17 that we sent to Mr. Lanterman to get him started. That was at  
18 our expense, and as my client would probably let you know more  
19 readily than I, we -- we don't come cheap. We spent a lot of  
20 time pulling that kind of stuff together to get him started.

21 We also spent a lot of time fielding questions from  
22 -- from him and his team to -- to keep him going, that kind of  
23 thing. The bottom line is we worked hard to -- to put this  
24 together and to get those e-mails out the door.

25 We also worked within the bounds of the April 17th

1 hearing, the orders that -- that you put out following that  
2 hearing, this July 10th letter, plus Mr. Lanterman's  
3 declaration. At deposition, Mr. Lanterman testified that he  
4 was -- that we never told him to either ignore or to deviate  
5 from any of that guidance, and that's because we didn't tell  
6 him to ignore it or to deviate from it.

7 Another point, your Honor: Mr. Lukas has said that  
8 -- that Mr. Lanterman was -- was our agent. He also was put  
9 forward as -- as their expert. He was -- he was their guy.  
10 They'd worked with him several times in the past. They  
11 understand his operation. They've seen his bills before. I'm  
12 amazed that they claim such surprise at his -- at his  
13 invoices.

14 The flip side is we've never worked with the guy  
15 before. This was the first time, and I think we did the best  
16 we could. I got to know Mr. Lanterman quite well. I think  
17 he's a competent guy. I developed a good working relationship  
18 with him. It was my first time. I didn't know the in's and  
19 out's of his operation; I didn't know the in's and out's of  
20 his team members. Neither did my colleagues, but we worked --  
21 we worked with him, and -- and we did a good job working with  
22 him.

23 There was no hiding or scheming. We -- we cc'd  
24 Plaintiffs' counsel on this July 10th letter. We also had  
25 initial meet-and-confers with them to exchange search terms

1 and the -- the screening terms, both the -- the terms like  
2 "privilege" and "confidential" and -- and the lawyers' names.  
3 We weren't trying to -- to hide the ball.

4 When issues arose later, we followed up with  
5 Mr. Lanterman. At deposition he testified that that kind of  
6 follow-up was -- is common with his clients. We didn't do  
7 anything wrong.

8 At most, this is a billing dispute with  
9 Mr. Lanterman. There's no grounds for us to -- to pick up  
10 these costs because we didn't do anything unreasonable, and we  
11 didn't do anything in -- in bad faith.

12 The bottom line, your Honor, is that Plaintiffs  
13 received about a hundred and fifty thousand top-level e-mails  
14 from eighty-seven different individuals' mailboxes, the  
15 thirty-two managers and the fifty-five plaintiffs who were at  
16 the company during the three-month time period that they  
17 selected, May -- April, May, and June 2004, and they got these  
18 hundred and fifty thousand e-mails at a cost of about seventy-  
19 nine thousand dollars, which is consistent with the other cost  
20 estimates that -- that have come up in this case, including  
21 the first batch of ninety-one thousand e-mails that -- that we  
22 produced to -- to Plaintiffs. That was the first installment.  
23 That was for forty-three thousand dollars, which to date we've  
24 borne the entire cost there.

25 Also, at deposition Mr. Lanterman provided a rule of

1 thumb in terms of how he prices out these kinds of projects,  
2 and he said that for restoring e-mails from a particular  
3 individual's mailbox costs between a thousand and eleven  
4 hundred dollars. Again, we produced e-mails for eighty-seven  
5 different individuals at a cost of seventy-nine thousand  
6 dollars, so it came in under that rule-of-thumb estimate that  
7 Mr. Lanterman provided, and frankly, your Honor, this -- this  
8 cost of seventy-nine thousand dollars, it's also consistent  
9 with a -- just a basic fact in discovery these days that  
10 electronic discovery is -- is not cheap. It's an expensive,  
11 high-tech endeavor. That's, frankly, the reason why we  
12 objected to -- to further electronic discovery earlier on. So  
13 it's consistent with all of that, your Honor, in terms of --  
14 of the price.

15 Another point I'd like to make, your Honor, is that  
16 in a different context, the -- the summary judgment motion,  
17 Plaintiffs filed their -- their partial motion for summary  
18 judgment back in the fall, and right up front they make clear  
19 and in fact I would say they brag about the fact -- about all  
20 the various e-mails that they got. They say that they've got  
21 to submit to the Court selected samples of e-mails in order  
22 not to inundate the Court with e-mails, and they cut and paste  
23 e-mails and put them right into the text of the brief, so  
24 they've gotten plenty of e-mails, your Honor. They've gotten  
25 them at the -- at -- at market cost, and they've made use for



1 those e-mails, and in fact they've -- they've bragged about  
2 the number of e-mails that they've received.

3 I think the bottom line is, though, now that they --  
4 they -- they struck their -- their bargain, they got -- they  
5 got those e-mails, they made use of them, they don't want to  
6 pay for it, and, your Honor, I think that's a pattern, and I  
7 would say that it's even a disserving pattern, and one thing  
8 that I wanted to do, your Honor, was provide you with sets of  
9 some of the correspondence that we've gotten throughout this  
10 process. If I could approach the bench?

11 THE COURT: Okay.

12 MR. VARNELL: Thank you, your Honor.

13 What I've given you, your Honor, is essentially a  
14 series of correspondence, primarily from -- from Plaintiffs'  
15 counsel Ms. Srey. That's her documents where I'm talking  
16 about in -- in terms of a pattern.

17 At that April 17th hearing, Mr. Lukas said that  
18 they'd put their money where their mouth is and fall on the  
19 sword in order to get e-mails. Just as I've said, we -- we  
20 worked throughout the summer and fall to get those e-mails.  
21 As soon as they get them, we receive this -- this October 5th  
22 letter from Ms. Srey saying that they're shocked by this  
23 outrageous bill and that when they initially discussed this  
24 project with Mr. Lanterman, he estimated that the project  
25 would cost approximately ten thousand to twelve thousand

1 dollars. I -- I can get into that -- that supposed estimate  
2 that was provided in a moment, your Honor.

3 The next stage was Plaintiffs demanded to take  
4 Mr. Lanterman's deposition, and they agreed and were ordered  
5 to pay -- and I'll -- I'll quote:

6 "all fees and expenses associated with this  
7 deposition."

8 That's from your Honor's October 1st, 2007, order,  
9 Docket Number four-seventy-three. Again:

10 "all fees and expenses associated with this  
11 deposition."

12 We objected to that. We said it was unnecessary.  
13 We said it was costly. We offered to put Mr. Lanterman on --  
14 on the phone with Plaintiffs in order to discuss what was at  
15 most a billing issue. They insisted on a deposition. They  
16 said that they'd pay for it. They ultimately got to take that  
17 deposition, and then days later I get this letter dated  
18 December 13th, 2007 -- and again I've highlighted the -- the  
19 relevant portions -- from Plaintiffs' counsel objecting to the  
20 cost of that -- that deposition, which we said up front was --  
21 was going to be costly and expensive. It's just another sort  
22 of step in this entire pattern, your Honor. They demanded  
23 this deposition. They said they'd pay for it. They get to  
24 take it, and then they -- they don't want to pay for it.

25 THE COURT: I didn't hear that as part of the

1 argument that he was making. He was talking about the reruns  
2 of the computer searches.

3 MR. VARNELL: It's --

4 MR. LUKAS: I'll -- I'll address it, Judge, when  
5 he's done.

6 THE COURT: Okay.

7 Go ahead, Mr. Varnell.

8 MR. VARNELL: And then -- and then, your Honor, also  
9 within that deposition Mr. Lukas referenced this additional  
10 work that they asked Mr. -- Mr. Lanterman to put together.  
11 They wanted him to go back and run some comparisons. The  
12 relevant cite is at page eighty-eight. He said that he could  
13 -- he could do that, and he -- he said that he could easily do  
14 it, but he also said that it would take some time to do that.  
15 That was the quote: "some time."

16 Mr. Lanterman then provided a -- a -- a specific  
17 time and cost estimate that it would take for him to -- to do  
18 that work. He said it was between twenty and twenty-five  
19 hours. We sent that on to -- to Plaintiffs' counsel, and  
20 then, your Honor, I get this -- this January 24th letter  
21 taking issue with that and essentially saying that I've  
22 somehow moved additional -- additional work unrelated to this  
23 project or some other case over to Mr. Lanterman so that he  
24 would essentially bundle those costs into -- into this cost  
25 estimate.

1 My point is, your Honor, it's a pattern here of --  
2 of demanding information, demanding discovery, whether it's  
3 e-mails, depositions, additional work, but then not wanting to  
4 -- to pay for it and not -- not wanting to hold up their end  
5 of the bargain.

6 And again, your Honor, we've -- we've worked hard  
7 with Mr. Lanterman. At most, Plaintiffs have a billing  
8 dispute with him, but that's it. There's no grounds to shift  
9 some of these costs over to us. We've worked hard with the  
10 guy to get those e-mails out the door, and that's what we did.

11 THE COURT: Is Mr. Lukas incorrect when he says that  
12 the instructions to Lanterman when he originally had the  
13 attorneys' names in the conjunctive, as both of them need to  
14 be in the terms, and that he did that run and that after that  
15 you decided that you wanted it rerun with one or the other  
16 name in the document?

17 MR. VARNELL: Your Honor, the -- the -- the  
18 first/last name issue was -- was discussed at -- at the  
19 April 17th hearing, and I would draw the Court's attention to  
20 a couple of different cites, one at page thirty-eight.  
21 Mr. Davis says to -- to do something less than a run for first  
22 names, what he referred to as the -- the "two Richards" issue,  
23 which was a reference, again, to Quicken Loans' corporate  
24 counsel Richard Chyette, to -- to run -- to run searches on  
25 something less than first names would -- would, quote/unquote,

1 not be failsafe.

2 He also, your Honor, at page fifty-five -- this is a  
3 direct quote -- says:

4 "It's going to be a real issue, if you will, the two  
5 Richards, that issue. There are going to be e-mails  
6 that are going to refer to Richard. Presumably  
7 Mr. Lanterman can identify them."

8 That was an issue that was -- that was brought up  
9 and discussed. We identified the fact we were going to ask  
10 Mr. Lanterman to -- to run those.

11 Mr. Lukas never --

12 THE COURT: But -- but why, then, wasn't that done  
13 on the first twenty-seven-thousand-dollar screening when he  
14 did the double names?

15 MR. VARNELL: You know --

16 THE COURT: If the -- if -- if the agreement was,  
17 "We're going to do disjunctive, either first or last name, and  
18 screen that out," that -- that wasn't what was done, it seems  
19 to me the instruction is -- either the first or the second  
20 were erroneous.

21 MR. VARNELL: It -- it -- it -- it did happen on the  
22 -- the second run, your Honor.

23 The July 10th letter, looking back in hindsight, I  
24 wish that I had made it -- made it clearer. I -- I -- I do  
25 wish that, but the -- the bottom line is I had -- I had

1 discussions with -- with Mr. Lanterman. Maybe this falls into  
2 the -- the category of the fact that I had never worked with  
3 the guy before. I told him that the -- the screening needed  
4 to be extensive. I thought he understood that. He then runs  
5 -- runs the searches in the -- the conjunctive, and at  
6 deposition he admitted that that was his interpretation.

7 I would respectfully say that under his  
8 interpretation, if the reference was just to the name Chyette,  
9 just to last names, those would have -- would have stayed in.  
10 That -- that wasn't -- that wasn't the -- the -- the proper  
11 way to do the screen. When I saw the invoice, I -- I was --  
12 or when I got the first -- excuse me -- the batch of manager  
13 e-mails back, I was surprised by that, so I called him up and I  
14 said, "What's the deal?" and I told him that he had to -- to  
15 go back and redo that, and the ironic thing is when I talked  
16 to him about that and he -- he informed me, "Well, I'm going  
17 to have to charge additional money for that" -- I mentioned,  
18 too, this -- this to you before, your Honor, and it came up at  
19 the deposition -- Mr. -- Mr. Lanterman acknowledged that I  
20 actually advocated on behalf of Plaintiffs and said, "This is  
21 a big project; I don't think you should charge double for --  
22 for any of this additional work." He took fifteen percent  
23 off. I didn't tell him to take fifteen percent off. I didn't  
24 discuss the -- the percentage or anything like that, but I  
25 advocated on behalf of -- of Plaintiffs. I didn't gleefully

1 run up the cost.

2 Similarly, it was -- it was Defendants that on his  
3 invoice saw that Mr. Lanterman had actually double-billed for  
4 two items. Mr. Lukas says that the -- the bill came in at  
5 ninety-one thousand dollars or something like that. We were  
6 the ones that informed Mr. Lanterman that, "It looks like  
7 you've got a mistake on the invoice here," and that's when he  
8 dropped it down to -- to seventy-nine thousand dollars, your  
9 Honor.

10 So again, we did the very best we could on this. No  
11 way did we gleefully run up any of the costs.

12 THE COURT: Well, gleefully or not, I mean, the --  
13 this first name, second name issue, if it had been right the  
14 first time, it seems to me that -- that the extra twelve  
15 thousand has got to be on your shilling.

16 Now, with regard to the embedded or nested, I don't  
17 know why he -- he wasn't given clear instructions on that,  
18 too, if you wanted him to search the attachments as well as  
19 the original document; and then not saying what the protocol  
20 was is -- which, the way I was ruling, this wasn't one of the  
21 issues that I focused on, but it -- it seems to me that that  
22 second run was also done because he wasn't told how to do it  
23 right the first time.

24 MR. VARNELL: Your Honor, our -- our -- our  
25 July 10th letter makes clear that he has to screen all

1 e-mails, and all non e-mail data and documents are not to be  
2 produced whatsoever.

3 A nested e-mail is an e-mail. If I forward an  
4 attachment on to somebody in an e-mail and I say, "Please look  
5 at the attachment," I mean that attachment, that's -- that's  
6 -- that's what gives the e-mail meaning. That stuff should  
7 have been screened. Mr. Lanterman -- he should have screened  
8 it.

9 To -- to the extent that there was any mistake, that  
10 mistake is on him. I mean, he's -- he's the expert. He made  
11 the decision not to screen that. We took the -- the -- the  
12 position that it needed to be screened, and our position  
13 actually increased the number of -- of e-mails ultimately  
14 produced to Plaintiffs, but a nested e-mail is an e-mail.

15 THE COURT: It increased it? Looking at the nesting  
16 increased it? -- Because you --

17 MR. VARNELL: Because the only other -- the only  
18 other alternative argument is that --

19 THE COURT: Because their search terms showed up  
20 more frequently than your exclusionary terms --

21 MR. VARNELL: Well, the -- the --

22 THE COURT: -- in -- in -- in the attachments.

23 MR. VARNELL: The -- the only -- the argument is  
24 that a -- a -- a nested e-mail is -- is not an e-mail, and if  
25 it's not an e-mail, then it shouldn't have been produced, but



1 we said if it was picked up by the search terms and it was a  
2 top-level e-mail, that it should go along with it, but then at  
3 the same time it should be screened for privilege. Otherwise  
4 they would -- the only other position is they were all non  
5 e-mails, and therefore the -- the protocol makes clear that  
6 stuff shouldn't have been produced.

7 THE COURT: So you're saying that the letter to --  
8 to Lanterman -- the July 10th letter made it clear that he was  
9 to search those.

10 MR. VARNELL: It made -- it made clear that all --  
11 all non e-mails or documents were not to be included in -- in  
12 the production, and if a nested e-mail is not an e-mail, then  
13 it's got to be non e-mail or something else, so it should have  
14 been just left aside and -- and not -- not included in the --  
15 the production.

16 We included it as part of the -- what was responsive  
17 in terms of what would be produced over to Plaintiffs,  
18 provided that it didn't contain one of the -- the privileged  
19 terms, and that's why we screened for it.

20 THE COURT: But what are you referring to in the  
21 July 10th letter that you just said that he misinterpreted?

22 MR. VARNELL: It's on -- on page two at -- at the  
23 top, Item Number One is where we -- in italics we say:

24 "In fact, non e-mail data and documents" --  
25 I want to make sure I'm giving you the right quote; it is

1 right at the beginning of the -- the italics -- italicized  
2 information.

3 THE COURT: In -- in one or two?

4 MR. VARNELL: Number one on page two.

5 THE COURT: Paragraph one. Okay.

6 MR. VARNELL: "No" -- "No access to non e-mail data  
7 and documents is to be provided to Plaintiffs or  
8 their counsel."

9 THE COURT: I take it that the attachments would be  
10 e-mails. If -- if what you're describing, the nested one is  
11 basically the forwarding of an e-mail, it -- it just gets a  
12 different format in Outlook than it does in Lotus, that that  
13 would be an e-mail so that he would have been producing them,  
14 and you're saying they weren't being produced.

15 MR. VARNELL: I'm saying under -- under this reading  
16 that the nested is not an e-mail, then it's got to be a -- a  
17 non e-mail and it shouldn't be part of the production. That's  
18 correct, your Honor. And the same way, an attachment is part  
19 and parcel to an e-mail. If I forward an attachment on to  
20 somebody and say, "Please review the attachment," I mean,  
21 that's the whole purpose of the e-mail, so very reasonably we  
22 took the position that -- that a nested e-mail is an e-mail,  
23 and an attachment is inherent to an e-mail so it's got to be  
24 screened for privilege if it's going to be included in -- in  
25 the production.

1 THE COURT: But why -- I mean, why would a person  
2 not think that, again, with these nestings that may be an  
3 e-mail because it's forwarding of an e-mail, but if the  
4 attachment was a pdf or WordPerfect attachment of a memorandum  
5 to the recipient, why would that -- why would he not  
6 reasonably assume that's not an -- that's not e-mail data?

7 MR. VARNELL: I think, your Honor, given the fact  
8 that he's an expert and -- and deals with this stuff, he  
9 should have absolutely assumed that that was either an e-mail  
10 or inherent to an e-mail, and at a minimum, he should have  
11 asked us about that.

12 But again, that goes to my point. This is a billing  
13 issue between Plaintiffs' counsel and Mr. Lanterman.

14 THE COURT: Mr. Lukas, why is it --

15 MR. LUKAS: I have a couple questions. Why -- why  
16 -- why, before turning a forty-thousand-dollar e-mail search  
17 into a seventy-nine-thousand-dollar e-mail search, they didn't  
18 call us or reply to one of the e-mails and say, you know,  
19 "We're having a problem. Lanterman screwed up. He did this;  
20 he did that. We have to go back to him. It might cost more  
21 money." Nothing like that. We've got them just running back,  
22 and frankly, if we didn't have that -- that detailed invoice,  
23 we would have no clue.

24 THE COURT: But that doesn't get away from the fact  
25 that maybe Lanterman bears some of the responsibility for not

1 getting a definition or a clarification of what non e-mail  
2 data. I mean, it seems to me that one of the primary  
3 questions that people that are thinking about this when  
4 they're searching e-mails is do you want to search the  
5 attachments or do you just want to search the body of the  
6 e-mail, and --

7 MR. LUKAS: Well, I find it hard to believe that --  
8 I mean, if -- if we were having this conversation before  
9 Mr. Lanterman spent the fifteen grand, I would say I find it  
10 hard to believe that there's an attachment that is -- there's  
11 an e-mail attaching something that's going to escape the  
12 screen. I mean, we're talking -- and I'd like Mr. Varnell to  
13 tell you what percentage of e-mails were screened here. It's  
14 over nine -- he knows, but Mr. Lanterman is telling us it's  
15 going to cost us six grand to find out. Nothing is slipping  
16 by this search. That's for darn sure.

17 And whether or not it should have been in the first  
18 place, we have no control over it. Their -- he's their agent.  
19 We're paying for it. We're not allowed to talk to him, and  
20 they're not letting us know any of this stuff is happening, so  
21 I don't know what we could have done about it at any stage of  
22 this process.

23 THE COURT: I mean, did you focus on that issue of  
24 the non e-mail data, whether that would flush all attachments?

25 MR. LUKAS: We didn't know it was an issue until we

1 got -- until we took Mr. Lanterman's deposition and found out  
2 why he ran up another -- why he ran another six-thousand-  
3 dollar run of the e-mail.

4 THE COURT: You didn't have any concern about what  
5 non e-mail would be and what -- what Lanterman was going to do  
6 with that?

7 MR. LUKAS: No. Did I? No.

8 I -- you know, you call it a mistake. You call it  
9 Lanterman's mistake, and then what? You call it Lanterman's  
10 mistake, and then you call us, maybe you, and say, "What are  
11 we going to do about this?" You don't just say, "Go ahead and  
12 run another sixteen-thousand-dollar run after I already had  
13 you run another twelve-thousand-dollar run without talking to  
14 Plaintiffs," when there's an e-mail sitting in your e-mail box  
15 from Ms. Srey.

16 THE COURT: This -- this -- this -- this was -- this  
17 was the instruction that went out that he ran, and that's when  
18 he did the screening attachments, and, I mean, obviously the  
19 language could have been clearer. Is there anywhere in here  
20 where he's told to -- to screen attachments?

21 MR. LUKAS: No. Nowhere in there.

22 THE COURT: And that didn't cause you concern? You  
23 didn't -- you were -- you were confident with this -- all the  
24 attachments were screened?

25 MR. LUKAS: What I was confident was that they --

1 that -- that all of these people --

2 THE COURT: Screened for screening in, not  
3 screening out.

4 MR. LUKAS: No, I -- I didn't have a position on it  
5 one way or the other. I never considered it, Judge. I can't  
6 tell -- I can't sit here and tell you I considered it. I  
7 didn't. I sure would have considered it if they'd called us  
8 and told us it was a problem.

9 THE COURT: And Lanterman didn't ask you this when  
10 he -- or get a clarification as to whether attachments were to  
11 be searched or just the body of the e-mail?

12 MR. VARNELL: He -- he did not, your Honor. He did  
13 ask about attachments or the nested e-mails, the same --  
14 the --

15 THE COURT: I mean, he talked about parent and --  
16 and -- and histories. I take it those he was understanding  
17 that he was -- he was to screen the whole thing, because he  
18 probably wouldn't have a methodology just to screen out the  
19 top part of it, because I think they're all just part of the  
20 text.

21 MR. VARNELL: My -- my understanding and intent was  
22 that he was going to screen the entire e-mail, including any  
23 nested e-mails or attachments, so I was more than surprised  
24 when he essentially made the call not -- not to do that.

25 And as to Mr. Lukas' point about --

1 THE COURT: He read the "no access to non e-mail" as  
2 ruling out attachments.

3 MR. VARNELL: I'm not exactly sure how -- how he in  
4 fact read that -- that specific language, your Honor, but he  
5 -- he did not screen for attachments and nested e-mails the  
6 first time around.

7 THE COURT: But, your Honor, I guess to answer  
8 Mr. Lukas' part about us not conferring with them every step  
9 of the way along here, your Honor, again you came up with a  
10 good solution to -- to balance their need or request for  
11 e-mails, our need to protect our privilege. We executed that  
12 -- that solution. Part of it was that Mr. Lanterman would  
13 work as our agent. If we were having to go to -- to Mr. Lukas  
14 or his firm and -- and check every step along the way, that  
15 would have defeated the -- the purpose of -- of the agency.  
16 They were -- they were pressing us to get the e-mails out the  
17 door. We were working diligently to do that, and when these  
18 issues -- we -- we quickly QC'd -- quality checked for -- for  
19 review each -- each installment that he sent us.

20 And again, your Honor, when -- when he came up and  
21 -- and gave us the -- the -- the manager e-mails the first  
22 time around, I advocated on behalf of Plaintiffs in terms of  
23 the price, and I think this is an important point: The  
24 overall production, the one hundred and fifty thousand  
25 e-mails that were produced, came in at market cost, both in --

1 in comparison to the number of e-mails --

2 THE COURT: Well, I -- I hear that.

3 MR. VARNELL: -- we produced and --

4 THE COURT: Let me ask, on -- on this third run, the  
5 one where they were doing embedded/nested, that was for the  
6 managers first?

7 MR. VARNELL: That's correct, your Honor.

8 THE COURT: Okay. And then it was rerun for the  
9 plaintiffs?

10 MR. VARNELL: That's right.

11 MR. LUKAS: No. By the time they got to the  
12 plaintiffs, they'd already cleaned up the first and last name  
13 and the embedded issue, so when they ran the plaintiffs the  
14 first time, it was a one-time run.

15 THE COURT: That was the --

16 MR. VARNELL: That's Submittal Number -- that's  
17 Submittal Number Four, your Honor.

18 THE COURT: But then there were four plaintiffs who  
19 got excluded.

20 MR. LUKAS: They repopulated.

21 THE COURT: And was that because of the names?

22 MR. VARNELL: Let -- let me answer that, your Honor,  
23 if I -- if I may.

24 Again, we did a quality control each time the  
25 e-mails were sent back to us. We noticed that one plaintiff's



1 mailbox had been over-excluded. It looked like all the  
2 e-mails had been taken out, so my colleagues and I, we called  
3 Mr. Lanterman and his team and said, "What's the deal with  
4 this?" That's when we realized that there was this overlap  
5 issue involving the first names.

6 We asked Mr. Lanterman's team to identify how many  
7 mailboxes that happened to. He came back with the four names.  
8 That's when we told him to repopulate those mailboxes and that  
9 we would -- we would review those mailboxes for privilege.

10 It wasn't because we were trying to hide the ball.  
11 It wasn't because we were trying to deprive him of e-mails.  
12 That was just essentially a -- a glitch in the system that we  
13 remedied, and we remedied -- remedied it manually at our cost.

14 THE COURT: The repopulating you didn't do at your  
15 cost because you would -- didn't know which e-mails were --

16 MR. LUKAS: No.

17 MS. SREY: No.

18 MR. LUKAS: The -- the manual review, we did.

19 THE COURT: What do you mean? Once he -- once he  
20 put the -- took the first names out of these four individuals,  
21 these names were -- you checked to make sure there weren't any  
22 attorney-client privileges --

23 MR. VARNELL: That -- that's correct.

24 THE COURT: -- and there weren't any. Okay.

25 I mean, I'm amazed that Lanterman didn't get a clear

1 and distinct marching order on whether there was or was not  
2 going to be a search of attachments, and I'm also -- of these  
3 that when he said we're going to go to first and last names,  
4 you didn't say, "Are you sure that none of the persons whose  
5 mailboxes we have, have any of these first names?" I mean, I  
6 just think that Lanterman has got to bear some of the costs on  
7 this thing because I think that --

8 MR. LUKAS: Your Honor, the point is are those are  
9 things we could have brought up. He says that to talk to us  
10 would have defeated the purpose of the agency. The purpose of  
11 the agency was to prevent us from seeing privileged documents.  
12 That was the purpose of the agency. It wasn't to keep us  
13 completely in the dark when you turn a forty-thousand-dollar  
14 search into an eighty-thousand-dollar one. That wasn't the  
15 purpose of the agency.

16 And -- and, you know, it goes even further. He  
17 talks about the nine thousand dollars for depo' prep. Why  
18 should we have to pay Lanterman nine thousand dollars because  
19 Mr. Varnell wants to prepare him for a depo'? What could you  
20 possibly have to prepare him for? He was talking about an  
21 informal conversation on the phone. Why do they need twenty-  
22 four hours to prepare him for a depo'? Why --

23 MR. VARNELL: Your Honor, I --

24 MR. LUKAS: -- and why should we have to pay for it  
25 so they can prepare him for a depo'?

1 MR. VARNELL: Your Honor, if I can respond to that  
2 point, they asked for the deposition. We said that it would  
3 be costly and expensive. We also said we'd put him on a  
4 conference call.

5 Your order said that he needed to do two things. It  
6 said that he needed to gather up all of his relevant  
7 documents, as did his team, and it said that he needed to be  
8 in position to explain his invoice to Plaintiffs. That's the  
9 conversation that I had with him. Those were the two marching  
10 orders I gave him, that he -- he and his team needed to gather  
11 up all their e-mails and other responsive documents. They did  
12 that, and then he put himself in position to -- to be able to  
13 explain the invoice.

14 I had one conversation with him the night before.  
15 This twenty-four hours, I'm not responsible for that. As I  
16 pointed out in my response letter to Plaintiffs --

17 THE COURT: Okay.

18 MR. VARNELL: -- when you -- when you ask to depose  
19 a CEO, they've got to take some time to get up to speed.

20 THE COURT: Did my original order say anything about  
21 who the -- or what the dispute resolution is likely -- is  
22 going to be vis-a-vis Lanterman, because he's obviously not  
23 here, and he has some due process rights, but I do think  
24 that --

25 MR. LUKAS: I don't believe so, your Honor.

1           Your Honor, one more thing on this issue, and I  
2 think this is important; maybe you don't think it is. It's  
3 very important for us that you know that this screening  
4 process eliminated virtually all of the e-mails. They're  
5 saying it will cost us somewhere between fifty-five hundred  
6 and sixty-eight-seventy-five to get an answer from Lanterman  
7 on what percentage of the e-mails were screened-slash-  
8 blockaded here. Mr. -- if Mr. Varnell is not prepared to give  
9 you that answer, we're going to go -- we're going to leave  
10 here and pay Lanterman that money to find out, because I think  
11 what you're going to learn is that it's ninety-five percent  
12 plus was screened. We got this much of this stuff, and --  
13 and --

14           THE COURT: Do you know what the percentage was?  
15 Did he give you the answer to that question?

16           MR. VARNELL: Your Honor, I know that he went back  
17 after the deposition and started looking at the manager  
18 e-mails because that's what he ran, you know, the two  
19 different screens, the combined first and last names and the  
20 single first and last names, and I know we made significant  
21 progress on that.

22           What I also know is that when I asked Plaintiffs to  
23 just give me specific assurance that they will pay for the  
24 work that they asked him to do, they haven't done that.  
25 Again, it's just another step in the process of them asking

1 him to do additional work but then not saying they'd pay for  
2 it.

3 MR. LUKAS: We're going to pay for it if he's not  
4 prepared to tell you -- we think he knows, but he's not  
5 prepared to tell you, and we'll -- we'll get that from him and  
6 we'll pay for it, because we think it's important you know  
7 that it's an extremely high number, probably in the ninety  
8 percent.

9 MR. VARNELL: I -- I don't know where this ninety or  
10 ninety-five percent number is coming from. I don't.

11 I also know that --

12 MR. LUKAS: Well, we'll find out.

13 MR. VARNELL: I also know that Mr. Lanterman can  
14 look at the manager e-mails, because those are the two  
15 different searches that he did in terms of combined first and  
16 last names.

17 MR. LUKAS: We know we've got plaintiffs who  
18 literally have no -- no e-mails in there: none. We think  
19 this -- and -- and we know -- you've got eighty-seven people  
20 and we've got a hundred and fifty thousand e-mails? You do --  
21 I mean, I don't know what your e-mail box looks like, but I'll  
22 bet you I've got fifty of them since we've been sitting --

23 THE COURT: What were your discussions -- what were  
24 your discussions with Mr. Varnell in -- in the earlier, you  
25 know, meet-and-confer over what Lanterman was going to do,

1 because again --

2 MR. LUKAS: It's in this letter, Judge.

3 THE COURT: -- it just -- it just seems to me that  
4 the issue of whether you're going to look at attachments or  
5 not look at attachments is, like, real early in the discussion  
6 somewhere, and in fact, you know, I think you would have  
7 wanted to make sure that they're going to be looking at the  
8 attachments because otherwise you're going to miss a lot of  
9 stuff, and you might also want to make sure that you're  
10 looking at all the histories, and if -- if a lawyer's name  
11 shows up on the fourth attachment, you get to at least see the  
12 parent document on that attachment.

13 MR. LUKAS: I would -- I would assume the opposite.  
14 I would assume that if the e-mail gets through, the  
15 attachments get through. That's what I would assume.

16 THE COURT: Well, you're talking about the --

17 MR. LUKAS: If the parent e-mail gets through, the  
18 attachment -- that would be my working assumption.

19 THE COURT: So -- so -- so you're accepting the fact  
20 that if a lawyer's name is in the fourth attachment, the  
21 entire string of four e-mails is excluded.

22 MR. LUKAS: No. You're saying -- you're saying what  
23 I would --

24 THE COURT: Well, that's -- that's -- if you're  
25 doing a search for excluded terms and on the fourth e-mail is

1 one of the lawyer's names, everything above it's going into  
2 the --

3 MR. LUKAS: No. You're asking what I would have  
4 presumed, and you would have presumed I would want that to  
5 happen. On the contrary, I would have presumed -- and maybe  
6 it's dumb of me to presume this -- I would have presumed that  
7 if the parent e-mail makes it through, the attachments make it  
8 through, but that's sort of like what we would have presumed  
9 had we put it in this letter to Lanterman. I can't tell you  
10 what we would have presumed.

11 THE COURT: The e-mails you got were produced to you  
12 in electronic form?

13 MR. VARNELL: Native PST, your Honor.

14 THE COURT: Okay.

15 MR. LUKAS: And that's -- that was the whole point  
16 of the Native -- that's what he had to convert that we paid  
17 the fifteen thousand dollars for, so that it would come in  
18 that format.

19 THE COURT: Okay.

20 MR. LUKAS: But we'll get you the percentage of  
21 e-mails screened because that's very important to us, and  
22 we'll -- I guess we're going to pay seven grand to do it,  
23 but he still hasn't answered the question what -- what  
24 percentage was excluded. I think they were almost all  
25 excluded, Judge. A hundred and fifty e-mails from eighty-

1 seven people over a three-month period that covers however  
2 long back -- they just sit there in your e-mail box -- sounds  
3 incredible to us.

4 THE COURT: Yeah. I also -- even though Mr. Davis  
5 may have used as an example at that hearing the Richard  
6 problem and -- and the difficulty to determine whether it's  
7 the marketer Richard or the lawyer Richard, I -- if I was told  
8 whether we were going to do first name and/or last names, I  
9 would say you can do only last names, but I -- I can't  
10 conceive that I would have ever authorized that a first  
11 name --

12 MR. LUKAS: We --

13 THE COURT: -- was going to exclude --

14 MR. LUKAS: We did address the Richard problem, your  
15 Honor. We addressed it by having -- limiting to our terms;  
16 they had exclusionary terms, and they got the full name on the  
17 thing. So we did. We -- I mean, this -- if you look at this  
18 document and you look at our screening, it was extremely  
19 broad. We did address any problem.

20 Boy, I'll tell you they sure didn't come out on the  
21 short end of the stick on this, so --

22 THE COURT: Wait a minute. I have not read the  
23 whole July -- is that -- is that discussed in -- is the  
24 Richard document discussed in here?

25 MR. LUKAS: No.



1 THE COURT: Okay.

2 MR. LUKAS: No. He's talking about -- when he was  
3 talking to you, you talked about what was discussed at the  
4 hearing with you. Afterward, we did this whole rigmarole.

5 THE COURT: Okay. But what was the resolution with  
6 respect to whether the first name or last name or both names  
7 or either name was going to be used? That was not decided at  
8 that hearing.

9 MR. LUKAS: It was the list. It was the list, and  
10 the list identified them by full name --

11 THE COURT: Okay.

12 MR. LUKAS: -- first and last name. That was the  
13 list.

14 MR. VARNELL: Again, your Honor, I would -- I would  
15 just point to page fifty-five of the transcript where my  
16 colleague Mr. Davis said:

17 "Presumably Mr. Lanterman can identify them."  
18 That's where he's referring to the real issue, if you will,  
19 the two Richards, that issue. His whole point was there are  
20 going to be e-mails where somebody may say "Richard," meaning  
21 Richard Chyette, the corporate counsel, advises this or that.

22 We talked and we agreed to a fully automated process  
23 in order to -- to expedite this. Mr. Lukas never commented or  
24 objected on any of that. All he said was that if -- if an  
25 e-mail has a lawyer's name, it can, quote/unquote, go right in

1 the dumper.

2 MR. LUKAS: Here's the list, Judge, and this is what  
3 we did after sitting down. Here's the list. Here's the  
4 exclusionary terms. It's not --

5 THE COURT: If you want, we can make copies of that  
6 list also.

7 MR. LUKAS: I'll give you this.

8 THE COURT: Is that attached?

9 MR. LUKAS: Yeah.

10 MR. SREY: Yes.

11 MR. VARNELL: It's -- it's in the pleadings, your  
12 Honor.

13 THE COURT: Okay. Okay. I will be able to get it  
14 out, then.

15 MR. LUKAS: I think this is the second time I've  
16 given it to you, actually.

17 THE COURT: No. That was the list --

18 MR. LUKAS: Oh, yeah. I gave you the list of  
19 managers.

20 THE COURT: You gave me -- the list here is just  
21 managers.

22 MR. LUKAS: But that's what he was given, and that's  
23 why he --

24 THE COURT: Exhibit D. Okay. That's all I need to  
25 know. I will -- I will tab it.

1 MR. LUKAS: Oh. Okay.

2 THE COURT: Give us Exhibit D.

3 It's not that Exhibit D.

4 MR. LUKAS: Exhibit --

5 MS. SREY: It -- it is D, but there's probably more  
6 than one.

7 THE COURT: It's in there.

8 MR. LUKAS: Apparently they gave me the -- the  
9 grouping binder.

10 Your binder has got them, right?

11 Yeah. There's nothing in the letter to Lanterman  
12 and in the protocol that talks about separating out this list  
13 in any way. These are the terms given to him.

14 THE COURT: I want to read this thing Mr. Davis said  
15 about the two Richards.

16 "Search term for privilege would also certainly be  
17 lawyers' last names."

18 Let me also -- because I know, having looked at this  
19 stuff, it's going to be a real issue -- if he wrote "two  
20 Richards," that issue --

21 (Pause in proceedings)

22 THE COURT: That's such an opaque aside, I'm sorry  
23 to say, to anything. I mean, the first thing he realizes is  
24 that the search term would certainly be the lawyer's last  
25 name, and then he's got the musing about first names, but he

1 doesn't say that, "We would want to search for first names,"  
2 or that that issue really got put in clear focus at the  
3 hearing, and I must say that if I were to have had to make a  
4 determination, I would say last name because, especially in  
5 string cites, usually somewhere in the e-mail address or  
6 somewhere a last name will appear as part of the identifier.

7 MR. LUKAS: Ms. Srey and Mr. Varnell talked about  
8 the -- the search terms over and over, and never once did  
9 Defendant take the position that it had to be separated out,  
10 and this is what was given, and this is the list: first and  
11 last name as -- as the exclusionary term.

12 MR. VARNELL: That -- that's because, your Honor, I  
13 know at the April 17th hearing that the -- the -- the two-name  
14 issue was -- was discussed. Mr. Davis says presumably  
15 Mr. Lanterman can identify them. I mean, that -- that  
16 statement says that we were going to ask him to identify first  
17 and last names. The entire point of this privilege screen was  
18 to err on the side of -- of being --

19 THE COURT: Well, that -- that --

20 MR. VARNELL: -- overly cautious, and --

21 THE COURT: Anyway, that's assuming that in a -- the  
22 fast-paced give and take of -- of -- of language, I am to say  
23 that infers that we're going to -- we've agreed to a search  
24 for first names.

25 Had we said we'll do a lawyer's -- for a search

1 name, if I was asked to decide on it, I would say either the  
2 combined name or the last name. I would never have authorized  
3 the first name because of the problem of overlapping first  
4 names being so common.

5 MR. VARNELL: Again, your Honor, at -- Mr. Lanterman  
6 then -- he used his own interpretation, which would have  
7 allowed the last names of lawyers to -- to remain. That --  
8 that clearly wasn't right. I don't think it was the intent  
9 coming out of -- out of the hearing, so, you know, I -- I  
10 corrected him on that point in order to make sure that last  
11 names were -- were screened out and so that, again, the  
12 privilege structure put in place -- the privilege protocol put  
13 in place provided maximum protection.

14 And again, in other context, Plaintiffs seemed very  
15 happy -- in fact, they -- again, they brag about the number of  
16 e-mails they got, and they make use out of them in their --  
17 their summary judgment motion. They got plenty of e-mails.

18 THE COURT: I just can't -- I mean, I -- again I --  
19 I -- who's responsible for -- for communicating clearly with  
20 Mr. Lanterman? I think Lanterman has got some responsibility  
21 for describing some of the problem that you've got to focus on  
22 and get clear and distinct answers to, and again the first  
23 name -- the first and/or last name is one of them. A list had  
24 both names. As he says, if the lawyer didn't have a first --  
25 his first name, was only referred to by his last name or used

1 a nickname as a signature like Tom instead of Thomas, that he  
2 would have missed that in there.

3 MR. LUKAS: How do you -- how -- we're running a  
4 search for the person's name. It's either to them, from them,  
5 or they're cc'd on the thing. Where would they -- why do you  
6 have to run a search for "David"? Why do you have to run a  
7 search for "Davy"?

8 THE COURT: I'm -- I'm ruling out David, but I'm  
9 saying with -- what he's saying is that had we run it as  
10 Lanterman initially ran it and as you say you authorized,  
11 first and last name, that you would not have gotten e-mails  
12 that had only the last name anywhere in the text.

13 MR. LUKAS: I don't -- I mean, you can ask  
14 Mr. Varnell. I don't think we did. The first -- ask him --

15 THE COURT: And sometimes people use "T" or "SPB"  
16 and -- instead of a full first name in the e-mail address.  
17 They often assign shortcuts for their -- you know, their  
18 common given name.

19 MR. VARNELL: Your Honor, if I -- when -- when I  
20 clarified the -- the first and last name issue with  
21 Mr. Lanterman, there's -- there's an e-mail attached as an  
22 exhibit where they then asked for clarification on common  
23 derivations of first names, I said, "No, 'Thomas' doesn't need  
24 to become 'Tom,'" that kind of thing.

25 THE COURT: But there wasn't this kind of discussion

1 at the initial round so you could get these, and that's why  
2 I'm surprised this thing even got launched in the first place  
3 without a lot of these questions getting asked. I mean, they  
4 just seem so primary.

5 MR. VARNELL: Again, I -- after sending him this --  
6 this letter, I had follow-up conversations with Mr. Lanterman,  
7 asked him if he understood it. I thought this issue was --  
8 was addressed with him. Apparently it was not because when we  
9 QC'd it, he'd gone ahead and -- and run the combined first and  
10 last name searches, which I then went back and said that's --  
11 that's not correct.

12 THE COURT: Well, I mean, I can't -- I mean, I'm  
13 making a lot of negative inferences with regard to Lanterman,  
14 and again he's not here to speak for himself, so I don't -- I  
15 don't -- I'm obviously not in a position to make any ruling.  
16 I'm not sure I have jurisdiction to make any rulings over this  
17 bill or whether this is a Minnesota -- Minnesota State Court  
18 issue.

19 MR. LUKAS: Well, we can't help you, Judge, because  
20 we haven't been allowed to talk to him, and they never talked  
21 to us while it was happening. That's the point. All this is  
22 going on behind the curtain, and then we just get the ninety-  
23 thousand-dollar or -- what is it? -- seventy-nine-thousand-  
24 dollar bill.

25 MR. VARNELL: They had deposed him, your Honor.

1 THE COURT: Anyway, this is something that -- and  
2 you can tell him I'm quite willing to give him a hearing, and  
3 I'll even do it telephonically and get written statements from  
4 him first, but it's an issue on which all three parties are  
5 going to have to give some, and part of the sum total, their  
6 share, should go that you're picking up twenty-four hours  
7 preparing for the deposition because that was way beyond what  
8 I was expecting, but that was nothing of their doing. They --  
9 it was not twenty-four hours with them.

10 MR. LUKAS: Well, I don't know that. I don't -- we  
11 don't know that.

12 THE COURT: He just said he didn't spend more than  
13 fifteen minutes with him --

14 MR. VARNELL: I --

15 THE COURT: -- giving him the instructions that I  
16 gave from the court -- from the bench, and when I gave those  
17 instructions, I was assuming it would take him several hours  
18 to round up what he did, maybe reread the letters, make sure  
19 he had those, but I wasn't anticipating it would take twenty-  
20 four hours to prepare for a deposition.

21 MR. LUKAS: I'm sorry. I didn't hear him say that  
22 he didn't spend --

23 MR. VARNELL: I had an initial conversation with him  
24 where I told him that he and his team needed to pull together  
25 all their documents and that he needed to be in position to



1 explain his invoice, and then the night before his deposition,  
2 I had a conversation with him.

3 Frankly, we weren't always dealing with  
4 Mr. Lanterman. We were at times dealing with members of his  
5 team. You know, he's got an organization underneath him.

6 So I had one substantive conversation with him the  
7 night before. That was it.

8 MR. LUKAS: For how long?

9 MR. VARNELL: I'd have to go back and look at my --  
10 my time records. Probably an hour.

11 THE COURT: Did he explain what at this deposition,  
12 or did you know that he was going to be able to make it in  
13 twenty-four hours for the --

14 MR. LUKAS: No. That -- that came after, of course,  
15 and now it's sixty-eight hundred bucks to find out what  
16 percentage of the e-mails were screened.

17 THE COURT: And did you find out what it's going to  
18 cost to find out how he spent those twenty-four hours?

19 MR. LUKAS: No. We can't talk to him.

20 THE COURT: Okay. Without his involvement, I can't  
21 resolve this dispute. I think a part of it goes on his not  
22 getting his clients to give him clear and distinct  
23 instructions on ambiguities that he would know are commonplace  
24 problems that come up in these kinds of searches.

25 MR. LUKAS: Your Honor, can I ask you when the scope

1 of this agency relationship ends? When can we talk to  
2 Lanterman?

3 THE COURT: I think that you have no objections to  
4 him talking to him not involving attorney-client privilege.

5 MS. SREY: No. There's a --

6 THE COURT: Pardon?

7 MS. SREY: There's a letter from them that says that  
8 we don't have permission to talk to them.

9 MR. LUKAS: Yeah. This letter from them saying we  
10 can't talk --

11 MR. VARNELL: We -- we have taken the position that  
12 -- that your order still -- still applies, your Honor, that  
13 he's -- he's our agent. I mean, that -- that order is still  
14 in place.

15 THE COURT: As your agent, so long as he is not  
16 talking about the content of any e-mails -- that is, the  
17 substantive content that might be involving attorney-client  
18 privilege -- I don't see what he can't talk about search  
19 protocols, instructions, communications.

20 MR. VARNELL: Your Honor, I think they should have  
21 to pay for those conversations as well as --

22 THE COURT: No, no.

23 MR. VARNELL: Oh.

24 THE COURT: If -- if they're going to --

25 MR. VARNELL: And what Mr. Lanterman -- or, excuse

1 me -- what Mr. Lukas has -- has offered to pay for in terms of  
2 any additional data that they want.

3 THE COURT: If -- if they want additional data,  
4 they're going to have to pay for it, and if they want to talk  
5 to him, they're -- what is his hourly rate?

6 MR. LUKAS: I don't know. It must be five hundred  
7 bucks.

8 MR. VARNELL: Well, it's here on his invoices, your  
9 Honor.

10 MR. LUKAS: Twenty-four hours is nine grand, so --  
11 wasn't it? Twenty --

12 MS. SREY: Twenty-four hours is nine grand, so --  
13 twenty-four hours of dep' --

14 THE COURT: Two-seventy-five?

15 MS. SREY: I think so.

16 THE COURT: Okay. Well, that's really not out of  
17 line for a forensic computer expert.

18 MR. LUKAS: Well, I'm not sure that's his --

19 MR. VARNELL: I think it's actually -- I think it's  
20 actually three seventy -- seventy-five, your Honor.

21 MS. SREY: Oh.

22 MR. LUKAS: Yeah. He's --

23 THE COURT: Three seventy-five?

24 MR. LUKAS: Yeah. His -- his associates are  
25 cheaper.

1 THE COURT: Yeah. Okay.

2 Anyway, there is a billing dispute. Who contributed  
3 to the problem? I think that there is some responsibility  
4 going all the way around. I must say that I'm sure  
5 Mr. Varnell will have learned from this the next time he deals  
6 with a forensic expert, but I must say if Lanterman is dealing  
7 with somebody that he thought was giving him -- giving him  
8 ambiguous instructions or instructions that they may not  
9 really want, that he's had some of the requirement to advise  
10 you to what exactly do you mean by this, because it's --  
11 because it's inconceivable that he doesn't get a clear and  
12 decisive answer on whether you're searching attachments and he  
13 doesn't get a clear and decisive answer as to names and what  
14 his, maybe, advice would be on searching for names and what he  
15 could do as a second round -- if you screen it this way, how  
16 much of additional search is going to be -- need to be done  
17 manually or can be done by another computer method.

18 But, I mean, I -- I can't resolve the dispute just  
19 on your present submissions. I mean, Mr. Varnell, I'm sure  
20 the last clear chance doctrine applies a little bit in this  
21 case, too, that if in your communications with him -- but you  
22 said you sent the 10th letter to them, and they didn't -- but  
23 -- but he ran -- the 10th letter came after his first run.  
24 That wasn't his -- that was before his first run.

25 MR. LUKAS: No. The 10th letter came before he did

1 a thing.

2 THE COURT: Okay.

3 MR. VARNELL: I'm sorry, your Honor. The 10th  
4 letter?

5 THE COURT: The July 10th letter was before he did  
6 anything.

7 MR. VARNELL: Oh, the July 10th letter.

8 MR. LUKAS: Yeah.

9 THE COURT: Okay. I was just getting that  
10 clarified.

11 Okay. Anyway, I can't resolve this, I'm sorry,  
12 based on the present submissions.

13 MR. LUKAS: So they -- so we can't talk to Lanterman  
14 about privileged information, but we can talk to him at his  
15 hourly rate about the process.

16 THE COURT: About the process, yes.

17 MR. LUKAS: Okay. Thank you, Judge.

18 Shall we renew the motion or talk -- Mr. Varnell and  
19 I talk after we talk with Lanterman or --

20 THE COURT: I -- I think you should talk to  
21 Lanterman and Mr. Varnell about trying to resolve this.

22 MR. LUKAS: Okay.

23 THE COURT: Okay?

24 MR. LUKAS: Okay.

25 THE COURT: Okay.

1 MR. LUKAS: That's what we'll do.

2 THE COURT: Thank you.

3 MR. LUKAS: Thanks, Judge.

4 MR. VARNELL: Thank you, your Honor.

5 MR. DAVIS: Thank you, your Honor.

6 (Proceedings concluded)

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I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Karin Dains  
Karin Dains, Court Transcriber

March 4, 2008  
Date Certified